IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-01246-SCT

JOSEPH PATRICK BROWN, APPELLANT

Versus

STATE OF MISSISSIPPI, APPELLEE

Appeal from the Circuit Court of Adams County, Mississippi

BRIEF OF APPELLANT

Oral Argument Requested

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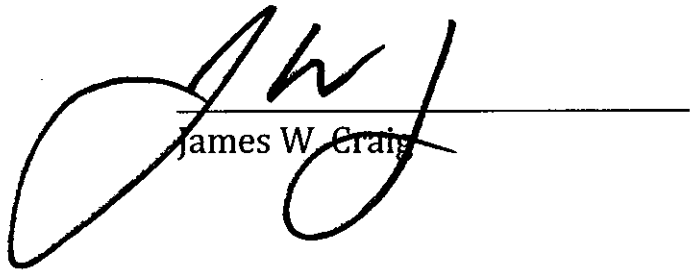
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of the case. These representations are made so that the Justices of this Court may determine disqualification or recusal.

Appellant:	Joseph Patrick Brown
Counsel for Appellant:	James W. Craig Louisiana Capital Assistance Center New Orleans, Louisiana
Appellee:	State of Mississippi
Counsel for Appellee:	The Hon. Jim Hood, Attorney General Hon. Marvin L. White, Jr., Asst. Attorney General

SO CERTIFIED, this the 31st day of January, 2011.



James W. Craig

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STATEMENT REGARDING ORAL ARGUMENT

MISS.R.APP.P. 34(a) requires that "Oral argument will be had in all death penalty cases." In recent years, this Court has granted oral argument in post-conviction cases involving the death penalty. *Goodin v. State*, No. 2007-CA-00972-SCT (argued August 12, 2009); *King v. State*, No. 2007-DR-01363-SCT (argued April 8, 2009).

This case, which presents serious issues about the petitioner's right to discovery under MISS.R.APP.P. 22(c)(4)(ii), and the use of expert testimony in support of mitigating circumstances under Miss. Code Ann. §99-19-101, deserves *en banc* oral argument.

STATEMENT OF ISSUES

ONE: Did the Circuit Court err by not granting the Petitioner's Motion for Rule 22 discovery in this death penalty post-conviction case?

TWO: Did the Circuit Court err by finding that Petitioner's trial counsel's failure to secure an expert report and/or expert mental health testimony on mitigating circumstances in Petitioner's capital murder trial did not constitute "deficient performance" under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny?

THREE: Did the Circuit Court err in denying post-conviction relief in this case?

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Joseph Patrick Brown ("Mr. Brown" or "Petitioner") was convicted of capital murder and sentenced to death by the Circuit Court of Adams County. His conviction and sentence were affirmed by this Court on direct appeal. *Brown v. State*, 682 So. 2d 340 (Miss. 1996) (*Brown I*). He timely filed his application for post-conviction relief in this Court. The application also requested investigative funding, discovery, and an evidentiary hearing. *See Brown v. State*, 749 So. 2d 82, 86 ¶4 (Miss. 1999) (*Brown II*).

This Court granted the post-conviction application as to Claim F, the failure to secure the assistance of expert testimony in preparing mitigating evidence. *Brown II*, 749 So. 2d at 89-91 ¶¶20-21. This claim was remanded to the Circuit Court of Adams County for an evidentiary hearing. Both of the Circuit Judges in that district recused themselves, and this Court appointed the Hon. Isidore W. Patrick, Jr., Circuit Judge of Warren County, to preside over the hearing.

After the remand, but prior to the hearing, this Court promulgated MISS.R.APP.P. 22(c)(4)(ii) which, required trial counsel and the prosecution to turn over their complete files to post-conviction counsel. Having received no

such discovery, Petitioner moved for an order requiring trial counsel and the State to comply with Rule 22. CP 23. The State opposed the motion and it was not granted. CP 26. Tr.4-5.[1]

On March 1, 2004, the Circuit Court conducted an evidentiary hearing on the claim. The Court entered its opinion on November 23, 2009. CP 67. However, neither the State nor Petitioner received notice of this ruling. By motion of April 8, 2010, Petitioner asked leave to re-open the time to file notice of appeal. CP. 72. The State confessed this motion, and it was granted on July 23, 2010. CP. 125. That same day, Petitioner filed his Supplemental Notice of Appeal. CP. 123.

STATEMENT OF FACTS

Petitioner's trial counsel, Pamela Farrington and Donald Ogden, moved that Mr. Brown be evaluated at the Mississippi State Hospital at Whitfield for purposes of determining whether there existed mitigating evidence as set forth in MISS. CODE ANN. §99-19-101(6). The Circuit Court granted this motion. Ex. 1-A. The Order granting the motion stated:

> The evaluation to be conducted shall be for the purposes of development of mitigation evidence, including, but not limited to, all statutory mitigating

[1] The Court reporter erroneously has the Court recounting its ruling on a motion "by the State," but there was no such motion.

factors as defined in the Mississippi Code Annotated Section 99-19-101 (1983).

Id.

On February 10, 1994, Ms. Farrington wrote the staff at the Mississippi State Hospital and enclosed the Court Order. Tr. 51-52; Ex. 1-B. Trial counsel knew that the following mitigation evidence, at a minimum, was potentially available:

- That Mr. Brown had a troubled childhood history, including that his father died in his youth and that his mother had killed a man;
- That Mr. Brown's capacity to appreciate the criminality of his condict was impaired by his drug use and dysfunctional childhood;
- That Mr. Brown was under the substantial domination of Rachael Walker, the co-defendant;
- That the evidence against Mr. Brown as the shooter was weak; and
- That Mr. Brown could be sentenced as an habitual offender, thus giving the jury notice that any life sentence would be served without the possibility of parole.[2]

Tr. 53 (Ms. Farrington); Tr. 57 (Mr. Ogden).

It was unusual for the State Hospital to be appointed specifically to study mitigating factors in a death penalty case. Tr. 9. Ninety-five percent of their examinations were to determine whether the defendant was competent

[2] The alleged offense was committed before the 1994 amendments to the Mississippi Code which required a sentence of life imprisonment in a capital murder case to be served without parole.

to stand trial; only five percent were to assess mitigation evidence in a capital case. Tr. 48.

The State Hospital did not do any formal psychological testing of Mr. Brown. Tr. 12. Dr. Criss Lott, Ph.D., instead conducted an interview with Petitioner. Tr. 47. Ms. Farrington was present for the interview. Tr. 10-11. Dr. Lott recognized that the death of Mr. Brown's father during Mr. Brown's childhood had been a major disruption in Petitioner's life, Tr. 25, 27 – indeed at age eight, Petitioner was observed to be sucking his thumb when discussing this event with Louisiana authorities. Ex. 1-I. Dr. Lott was also aware of Mr. Brown's history of drug use. Tr. 32-34.

Dr. Lott understood that there were indications that Mr. Brown had a low average intelligence of about 83. Tr. 40. He conceded that, because there was some question regarding whether Mr. Brown was under the substantial domination of Ms. Walker, the difference in intelligence between the two would be relevant. Tr. 30, 41.

Also, there were indications that Mr. Brown had suffered two automobile accidents, and had manifested seizure-like symptoms after that. Tr. 20-24. However, Dr. Lott testified that, as a medical issue, any follow up

regarding what the seizures could indicate was in Dr. McMichael's purview. Tr. 48.

After the initial interview of Mr. Brown, Dr. Lott and Ms. Farrington discussed the case. Tr. 13. This included a "mitigation diagnosis." *Id.* But De. Lott also warned that the presentation of mitigation posed a risk of opening the door for evidence that he considered detrimental to Mr. Brown. Tr. 45.

Dr. McMichael did not have a strong recollection of this case. He did, however, remember that he reviewed the documents collected by the State Hospital staff and trial counsel. Tr. 68. He also remembered meeting with Dr. Lott and Ms. Farrington. Tr. 73. He thought that doing further work "would not have been helpful to the defendant." Tr. 68.

Although Dr. McMichael did not recall the analysis he made of the Brown case in 1994, he did give his opinion about available mitigation evidence from his more recent review of the State Hospital's file. Dr. McMichael found no statutory mitigating factors to be present. He did, however, "answer[ ] in the affirmative things that we would sometimes list as non-statutory mental health circumstances." Tr. 70. Those mitigating circumstances included:

- Mr. Brown's parents were never married;

- His parents separated when he was seven or eight years old;
- His mother reportedly shot a half-sibling's father when Mr. Brown was five or six years old;
- Mr. Brown's stepfather abused alcohol;
- Mr. Brown's biological father died during Brown's childhood;
- Mr. Brown was struck by a car at age thirteen;
- He had a history of conduct disorder problems in adolescence;
- He had a history of substance abuse including alcohol, marijuana and cocaine; and
- He was probably using cocaine around the time of the alleged offense.

Tr. 70-71.

Dr. McMichael also testified about the "potential detrimental factors" that, in his view, could have been used by the State against Mr. Brown, had the State Hospital generated a report on the mitigating circumstances set forth above. Tr. 71-72. These factors included:

- a prior criminal history dating back to when Mr. Brown was a juvenile;
- an unadjudicated allegation of prior use of a firearm in criminal activity;
- evidence that Brown was a major participant in the pending case;

- that the victim in the pending case had been killed to conceal a crime;
- that the victim in the pending case was shot a number of times;
- that Brown had been using or attempting to use drugs just before the offense in the pending case was committed;
- that some of the money from the offense in the pending case had been used to buy drugs;
- that Brown was "into one thing or another" as a juvenile;
- that Brown escaped subsequent to the offense.
- Tr. 72.

Ms. Farrington remembers being told at Whitfield "that any report that would be generated from the interview and the testing that was done would be more harmful than beneficial to our client." Tr. 53. She did not remember any more specific details about this, beyond "that we had discussed the mitigation factors that we were looking for. It is my recollection that it was very little in the way of mitigation. There was some, but not enough to offset any harm that might come from the report being generated." Tr. 53. Mr. Ogden concurred. Tr. 62.

Based on this, Ms. Farrington testified that "Mr. Ogden and I together made the decision not to ask the report to be generated." Tr. 53.

SUMMARY OF THE ARGUMENT

ISSUE ONE: Rule 22 had been promulgated after this Court's remand for an evidentiary hearing in Brown II. After Circuit Judge Patrick was appointed as Special Judge, Petitioner sought the benefit of Rule 22. It was error for the Circuit Court to deny Petitioner's Rule 22 discovery motion. *Russell v. State*, 819 So. 2d 1177, 1180 ¶¶9-10 (Miss. 2001). Without the benefit of the discovery, it is impossible to gauge the prejudicial effect of the denial of Petitioner's motion – thus the denial of discovery cannot be deemed harmless. *Dawkins v. Redd Pest Control, Inc.*, 607 So. 2d 1232, 1236 (Miss. 1992).

ISSUES TWO AND THREE:

It is well-established that defense counsel's failure to investigate and present the basis of his client's mitigation defense constitutes ineffective assistance of counsel. *Sears v. Upton*, 130 S. Ct. 3259, 3262 (2010); *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v Taylor*, 529 U.S. 362 (2000); *Lockett v. Anderson*, 230 F.3d 695, 710 (5th Cir. 2000). This Court will reverse a Circuit Court's post-conviction ruling that counsel was not ineffective, and render judgment for the petitioner on appeal, where such a claim was not correctly adjudicated below. *Doss v. State*,

19 So. 3d 690 (Miss. 2009). This Court also takes seriously the principle that "an attorney's lapse must be viewed in light of the nature and seriousness of the charges and the potential penalty." *Id.* at ¶9, citing *Ross v. State* 954 So.2d 968, 1004 (Miss. 2007).

It was objectively reasonable for trial counsel to forego a report and testimony from the State Hospital doctors on the mental health mitigation set forth in the Statement of Facts above. Both trial counsel and the doctors testified that the decision was made so that the door would not be opened to the "detrimental evidence" in the records.

That, however, was a false dilemma, for two reasons. First, . it is counsel's duty, not the experts', to determine whether potential mitigation evidence should be investigated and presented in the sentencing phase of a capital case. Thus, this Court has found that a defense attorney in a capital case performed deficiently under *Strickland* where counsel failed to properly utilize the State Hospital, as appointed defense experts, in developing mitigation evidence. *Ross, supra.*

Second, that the potential mitigation is potentially "double-edged" -- that is, includes **some** negative aspect that can be used against the defendant – does not make the decision to forego further investigation a reasonable

strategic choice. Much of the mitigating evidence that trial counsel failed to develop or present in *Sears, Porter, Rompilla, Wiggins* and *Williams* could similarly be deemed "double edged," but this did not prevent the Supreme Court from finding that counsel was deficient for failing to investigate and present this evidence.

And in *Sears*, the Supreme Court went even further, teaching that "adverse" aspects of a defendant's mental health evidence can actually help the jury understand the context of the defendant's actions and thus shape their view of his culpability, saying "[t]his evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts. *See Sears*, 130 S. Ct. at 3264.

This Court utilized the same approach in *Woodward v. State*, 635 So. 2d 805 (Miss. 1993), holding that it was unreasonable for trial counsel to forego presentation of evidence of mitigating circumstances through expert testimony due to fear of opening the door to "bad character" evidence. The same is true here. Counsels' decision not to pursue the mitigation evidence identified by the State Hospital was not a reasonable strategic decision. The Circuit Court erred in finding otherwise.

In Mississippi, the jury must be unanimous in order to sentence a capital defendant to death. Thus if this Court concludes that even one juror would have concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence set forth above. then prejudice will have been established. *See Lockett, supra*, 230 F.3d at 716; *see also Neal v. Puckett*, 286 F.3d 230, 241 (5th Cir. 2002) (en banc) (same). Petitioner Brown clearly meets this standard.

LAW AND ARGUMENT

ISSUE ONE: JOSEPH BROWN, AS A DEATH-SENTENCED PETITIONER, IS ENTITLED TO DISCOVERY UNDER MISS.R.APP.P. 22(C)

Mr. Brown's original Application for Leave was filed in this Court on March 17, 1998. The application specifically requested investigative funding, discovery, and an evidentiary hearing. *Brown II*, 749 So. 2d at 86 ¶4.

This Court's decision remanding the case for hearing was rendered on November 4, 1999. The decision specifically allowed Mr. Brown to seek discovery from the Circuit Court. *Brown II*, 749 So. 2d at 93 ¶29.

The next year, July 22, 2000, this Court revised MISS.R.APP.P. 22. One of the revisions created new Rule 22(c)(4)(ii), which provided for discovery without the necessity of filing any motion for same:

> Upon appointment of counsel, or the determination that the petitioner is represented by private counsel the petitioner's prior trial and appellate counsel shall make available to the petitioner's post-conviction counsel their complete files relating to the conviction and sentence. The State, to the extent allowed by law, shall make available to post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner.

Both Circuit Judges in the district recused themselves, and this Court appointed the Honorable Isadore W. Patrick, Jr., as Special Judge in this case. After Judge Patrick's appointment, Petitioner filed a motion seeking Rule 22 discovery prior to the evidentiary hearing mandated by this Court. CP 23. The State opposed the motion and it was not granted. CP 26. Tr.4-5.[3]

The Circuit Court's failure to grant the discovery motion was error. This Court has held that Rule 22 is to be enforced, if necessary by compulsory process. *Russell v. State*, 819 So. 2d 1177, 1180 ¶¶9-10 (Miss. 2001).

In the Court below, the State faulted Petitioner's counsel for not seeking discovery earlier. This was a specious argument. In the first place, Rule 22(c)(4)(ii) is self-executing. The State and prior defense counsel should have, on their own initiative, provided Petitioner with their complete files. Secondly, as the motion for discovery asserted, Judge Patrick had only been recently appointed to the case. There had previously been no judge who could have ruled on any motion for discovery.

This Court has held that the dismissal of a claim in the absence of an opportunity for discovery is reversible error:

[3] The Court reporter erroneously has the Court recounting its ruling on a motion "by the State," but there was no such motion.

> It was error for the trial court to have dismissed such accusations as lacking evidence when the plaintiffs presented the best evidence available to them, and they were not allowed an opportunity to obtain further information in an effort to validate their assertions. Therefore, the combination of a complete lack of an opportunity for discovery and the absence of an answer by the defendants precludes summary judgment at this time.

Sullivan v. Tullos, 19 So. 3d 1271, 1277 ¶25 (Miss. 2009). The erroneous denial of discovery cannot be harmless error, since without the discovery, there is no way to determine the prejudicial effect of the error:

> Erroneous denial of discovery is ordinarily prejudicial in the absence of circumstances showing it is harmless. Here, since we cannot determine from the record whether the requested documents might have changed the result in this trial, we cannot say the error was harmless.

Dawkins v. Redd Pest Control, Inc., 607 So. 2d 1232, 1236 (Miss. 1992).

Because Petitioner Brown was denied Rule 22 discovery, this Court should vacate the Circuit Court's order and remand this case for enforcement of Rule 22 and a new evidentiary hearing.

ISSUE TWO AND THREE: THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT

A. General Principles

This Court is familiar with the two-part test for claims of ineffective assistance of counsel. First, a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Second, the defendant must show that the acts or omissions charged prejudiced his defense; i.e. the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003). *See Lockett v. Anderson*, 230 F.3d 695, 710 (5th Cir. 2000).

As the Fifth Circuit stated in *Lockett*, "[i]t is clear that defense counsel's failure to investigate the basis of his client's mitigation defense can amount to ineffective assistance of counsel. *See, e.g., Williams v Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000). When considering a failure to investigate claim the Supreme Court has said, "counsel has a duty to make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 711, *quoting Strickland*, 466 U.S. at 691."

In *Williams v. Taylor*, cited by the *Lockett* Court, the United States Supreme Court analyzed the "deficient performance" prong of *Strickland* in the context of the duty of counsel in a death penalty case to investigate and present mitigation evidence at the sentencing phase of the trial. The Supreme Court concluded that the petitioner's "constitutional right to effective assistance of counsel" had been violated and that the Virginia Supreme Court, in reviewing Williams' post-conviction claim of ineffective assistance of counsel, had "failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Williams*, 120 S.Ct. at 1516. Importantly, the Supreme Court stated that the state supreme court had "failed to evaluate the **totality** of the available mitigation evidence–both that adduced at trial, and the evidence adduced in the post-conviction proceeding–in **re-weighing** it against the evidence in aggravation." *Id.* at 1515 (emphasis added).

With the evidence properly considered, it was clear that trial counsel had "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood," *id.* at 1514, had failed to look into prison records which would have contained evidence to

assist the jury in the sentencing phase, and had failed to talk to and call witnesses which would have testified in Williams' favor at the sentencing hearing. *Id.*

The deficient performance prong of the *Strickland* standard was also at issue in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). The *Wiggins* Court reversed a Fourth Circuit decision that rejected the petitioner's claim of ineffective assistance of counsel based on counsel's failure to investigate the petitioner's background for mitigation purposes. In *Wiggins*, defense counsel conducted at least **some** amount of investigation into petitioner's background for mitigation purposes. Testing by a psychologist revealed, among other things, that the petitioner had an IQ of 79. *Id.* at 2536. Counsel for the petitioner in *Wiggins* also had a written PSI that contained a brief "personal history[.]" *Id.* That document gave some indication of a troubled childhood. *Id.* Based on these two sources, defense counsel for petitioner decided not to conduct further investigation. *Id.*

The state court in *Wiggins* had rejected the petitioner's ineffectiveness claim "because counsel had *some* information with respect to petitioner's background . . . they were in a position to make a tactical choice not to present a mitigation defense. *Wiggins,* at 2538. The U.S. Supreme Court rejected that

assumption. *Id.* The Court noted that in "assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id. Wiggins* makes clear that the *Strickland* standard for ineffective assistance of counsel "does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Id.*

To show deficient performance, Petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687. More recently, the United States Supreme Court has held that counsel's failure to investigate and present evidence of mitigating circumstances as falling short of this objective standard. *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (finding *Strickland* applicable where uninvestigated evidence, which included childhood history of physical abuse and brain abnormality, "'might well have influenced the jury's appraisal of [Porter's] moral culpability.'"); *Wiggins*, 539 U.S. at 536 ("Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability). *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000)

In this regard, counsel has an "obligation to "conduct a thorough investigation of the defendant's background." *Porter v. McCollum*, 130 S. Ct. 447, 452-53 (2009), *citing Williams, supra*, at 396 (2000); *see also Wiggins, supra*, at 510; *Sears v. Upton*, 130 S. Ct. 3259, 3262 (2010).

B. The Circuit Court's Opinion

In a recent case which reversed the Circuit Court's denial of a capital defendant's *Strickland* claim, this Court noted the appropriate standard of review:

> When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised the applicable standard of review is *de novo.*

Doss v. State, 19 So. 3d 690, ¶5 (Miss. 2009). This Court also takes seriously the principle that "an attorney's lapse must be viewed in light of the nature and seriousness of the charges and the potential penalty." *Id.* at ¶9, citing *Ross v. State*, 954 So.2d 968, 1004 (Miss. 2007) and *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990).

In this case, the Circuit Court held that trial counsel's performance was not deficient; thus, the court below did not determine whether Mr. Brown was prejudiced by the failure to secure expert testimony of mitigating circumstances.

Judge Patrick stated:

> As a matter of trial strategy [Ms. Farrington and Mr. Ogden] concluded that since Dr. Lott, who had testified in numerous death penalty cases before, had determined, in his professional opinion, that there was not much in the form of mitigating evidence in the exam, that it would be better not to direct that a written report be made. They were also aware, according to them, that there were things in the report that may be harmful to the Defendant as well.
>
> . . . .
>
> Therefore, the Court finds that after consideration of the totality of the circumstances then and there present, for the trial counsels to consider, the failure of the trial counsel not to seek that a written report be generated, and the subsequent non use of said report in mitigation at the sentencing phase of the trial was not ineffective assistance of counsel.

CP 88, 89-90.

The question before the Circuit Court – and now this Court -- is quite simple: was it objectively reasonable for trial counsel to forego a report and testimony from the State Hospital doctors on the mental health mitigation set forth above?

C. *Trial Counsels' Decision To Forego Expert Mitigation Testimony Was Objectively Unreasonable and Therefore Constituted Deficient Performance Under Strickland*

As set forth in the Statement of Facts, supra, both trial counsel and the doctors testified that the decision was made so that the door would not be opened to the "detrimental evidence" in the records. That, however, was a false dilemma, for two reasons. First, . it is counsel's duty, not the experts', to determine whether potential mitigation evidence should be investigated and presented in the sentencing phase of a capital case. Thus, this Court has found that a defense attorney in a capital case performed deficiently under *Strickland* where counsel failed to properly utilize the State Hospital, as appointed defense experts, in developing mitigation evidence:

> In the present case, Ross undoubtedly alleges facts which demonstrate a need to develop mitigating evidence based on potential psychological problems. **The Mississippi State Hospital at Whitfield conducted a psychological evaluation of Ross and discovered a number of potential mitigating factors**, including accounts of physical and sexual abuse, **possible alcoholism**, accounts of visual and auditory hallucinations, and the **deaths** of his ex-wife and four young children in a car accident in 1985 and the brutal murder of his sister in 1982. The supplemental record also reveals that, at the time of his examination, Ross was taking anti-psychotic medication and medication for depression. While

> Ross testified to the death of his family, physical abuse as a child, and his drinking problems, and his mother testified to the murder of his sister, **defense counsel provided no expert evidence about how these events had affected Ross psychologically**.

Ross v. State, 954 So.2d 968, 1006 ¶87 (Miss. 2007)(emphasis added). *See Wilson v. Sirmons*, 536 F3d 1064, 1089 (10th Cir 2008) (An attorney has a responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts the experts do not request and must at a minimum exercise supervisory authority over the expert); *see also Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999)(counsel must select appropriate experts and "present those experts with information relevant to the conclusion of the experts"); *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) (counsel have an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health).

Here, trial counsel surrendered their strategic judgment to the State Hospital experts. Although Ms. Farrington and Mr. Ogden testified that they made the decision not to request an expert report, the record is clear that this was done only after Dr. Lott and Dr. McMichael stated that they thought the testimony that was available was more likely to be harmful than helpful. That is exactly backward – it is counsel, not the mental health experts, who have

the duty to know the law and to give the experts the information needed to render their opinions about mitigation. See *Johnson v. Bagley*, 544 F.3d 592, 605 (6th Cir. 2008) (counsel's performance deficient because they failed to use their mental health expert properly, leading to damaging testimony from him); *Wilbey v. Quarterman*, 309 Fed.Appx. 795, 803-04 (5th Cir. 2009) (same).

Second, that the potential mitigation is potentially "double-edged" -- that is, includes **some** negative aspect that can be used against the defendant – does not make the decision to forego further investigation a reasonable strategic choice.[4] In *Smith v. Texas*, 543 U.S. 37, 48 (2004), the Court reaffirmed that evidence of the defendant's low IQ, depraved family background and young age were just such circumstances – even if they also could be used to show a propensity to pose a future danger to society. This followed the now well-established case of *Penry v. Lynaugh*, 492 U.S. 302 (1989).

In that case, the Court specifically noted that the defendant's evidence of mental retardation and childhood abuse functioned as a "two-edged sword," because it might "diminish his blameworthiness for his crime even [while

[4] Moreover, much of the "detrimental evidence" cited by Dr. McMichael had to do with the facts of the capital murder for which Brown was standing trial. These facts were sure to be admitted into evidence anyway, in the guilt phase of the trial.

indicating] a probability that he will be dangerous in the future." *Penry*, 492 U.S. at 324. Nevertheless, the Court held that such evidence had relevance to Penry's moral culpability "*beyond the scope* of the [deliberateness and future dangerousness] special issues." *Id.* at 321-22 (emphasis added). Likewise, in *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259 (2007), the Court explained that evidence of childhood deprivation and lack of self-control are relevant to a defendant's moral culpability not because it rebuts either deliberateness or future dangerousness but because it "provide[s] the jury with *an entirely different reason*" for withholding the ultimate penalty. *Id.* (emphasis added).

The Supreme Court has applied these teachings to find capital trial counsel ineffective for failing to investigate and present mitigation evidence, even if it is "double-edged." Much of the mitigating evidence that trial counsel failed to develop or present in *Sears, Porter, Rompilla, Wiggins* and *Williams* could similarly be deemed "double edged," but this did not prevent the Supreme Court from finding that counsel was deficient for failing to investigate and present this evidence. *See e.g., Rompilla*, 545 U.S. at 392-93 (petitioner suffered abuse by his father, organic brain damage impairing his cognitive functions, fetal alcohol syndrome, and an IQ in the mentally retarded range); *Wiggins*, 539 U.S. at 516-17 (petitioner suffered from borderline mental retardation, privation and physical abuse while in the custody of his

alcoholic mother, and sexual molestation and repeated rape while in foster care); *Williams*, 529 U.S. at 395-96 (petitioner suffered parental neglect, abuse and privation by his parents, and borderline mental retardation).

In each of these cases, the aggravating "edge" associated with evidence of child abuse and mental dysfunction added to the already substantial evidence that the defendant could be a danger to society.[5]

Despite the brutal nature of those defendants' crimes and the fact that much of their mitigation evidence could be viewed as "double-edged," the U.S. Supreme Court determined in *Rompilla*, *Wiggins* and *Williams* that "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the petitioner's] culpability," and that counsel's failure to develop such evidence demonstrated deficient performance. *See Rompilla*, 545 U.S. at 393 (quoting *Wiggins* and *Williams*) (internal citations and quotation marks omitted); *Williams*, 529 U.S. at 398 ("the graphic description of Williams' childhood, filled with abuse and

[5] *See, e.g., Rompilla*, 545 U.S. at 377-78 (petitioner had a significant history of felony convictions involving the use or threat of violence, murdered a bar owner in the course of committing another felony, stabbing the victim repeatedly, torturing him and setting his body on fire); *Wiggins*, 539 U.S. at 514 (petitioner drowned a 77 year-old woman in her bathtub, and ransacked and robbed her apartment); *Williams*, 529 U.S. at 367-68 (petitioner confessed to robbing and clubbing a man to death with a mattock who refused to lend him "a couple of dollars"). *Williams* further recognized that had trial counsel conducted the appropriate mitigation investigation, "not all of the additional evidence was favorable to Williams." *Williams*, 529 U.S. at 396; *see also id.* at 418 (Rehnquist, C.J., dissenting) (observing that Williams savagely beat an elderly woman, stole two cars, started a fire outside a victim's home before attacking and robbing him, stabbed a man during a robbery, set fire to the city jail and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw).

privation, or the reality that he was borderline mentally retarded, might well have influenced the jury's appraisal of his moral culpability").

Indeed, in *Porter*, the United States Supreme Court recently repudiated, as an **unreasonable** application of *Strickland*, any side-stepping or discounting of mitigating evidence, finding it unreasonable to conclude that Porter's jury would have found his meritorious military service "inconsequential" simply because it also heard that he had gone AWOL on more than one occasion. *See Porter*, at 130 S.Ct. 455. As the Court explained,

> the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. [] The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea.

Id. (footnote omitted).

And in *Sears*, the Supreme Court went even further, teaching that "adverse" aspects of a defendant's mental health evidence can actually help the jury understand the context of the defendant's actions and thus shape their view of his culpability:

> Finally, the fact that along with this new mitigation evidence there was also some adverse evidence is **unsurprising,** given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive . . . This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts . . . .

See Sears, 130 S. Ct. at 3264 (emphasis added, internal citations omitted).

This Court utilized the same approach in *Woodward v. State*, 635 So. 2d 805 (Miss. 1993). In *Woodward*, this Court held that evidence of mitigating circumstances through expert testimony does not open the door to "bad character" evidence. Woodward's counsel had the defendant interviewed and examined by a Dr. Thurman. But in the sentencing phase of the trial, counsel chose to limit Dr. Thurman's testimony, believing that they would risk "opening the door" to negative evidence if they elicited a more complete description of mitigating factors.

On post-conviction review, this Court held Woodward's lawyers ineffective for failing to present the mitigating circumstances present in Dr. Thurman's interviews:

> At trial, Woodward's attorney allowed Dr. Thurman to testify only to the results of his testing and not to the

> detailed history brought out during the interviews with Woodward . . . .
>
> By not realizing that they could offer Dr. Thurman's testimony about Woodward's mental illness without opening the door to unlimited character evidence, Woodward's trial counsel were ineffective.

Woodward, 635 So. 2d at 810.

The same is true here. Counsels' decision not to pursue the mitigation evidence identified by the State Hospital was not a reasonable strategic decision. The Circuit Court erred in finding otherwise.

D. Trial Counsels' Deficient Performance Prejudiced Mr. Brown

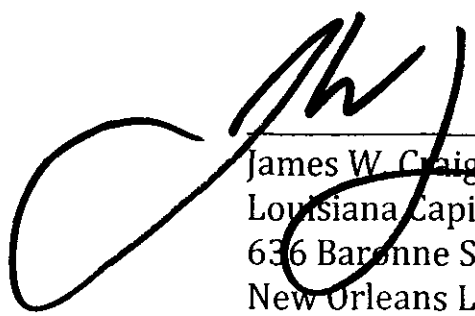
In Mississippi, the jury must be unanimous in order to sentence a capital defendant to death. Thus if this Court concludes that even one juror would have concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence set forth above. then prejudice will have been established. *See Lockett, supra*, 230 F.3d at 716; *see also Neal v. Puckett*, 286 F.3d 230, 241 (5th Cir. 2002) (en banc) (same). Petitioner Brown clearly meets this standard.

CONCLUSION

Joseph Brown was denied the right to discovery under Rule 22. That is an independent ground for reversal. Despite this handicap, Mr. Brown has established both prongs of the *Strickland* test with respect to Claim F of his Motion to Vacate.

If this Court reverses only on the Rule 22 discovery issue, the Circuit Court's order should be vacated and the case remanded for full discovery and a new post-conviction evidentiary hearing. If, however, this Court reverses on the *Strickland* issue, it can, as it did in *Doss*, vacate his death sentence and remand this case to the Circuit Court for a resentencing trial.

Respectfully Submitted,



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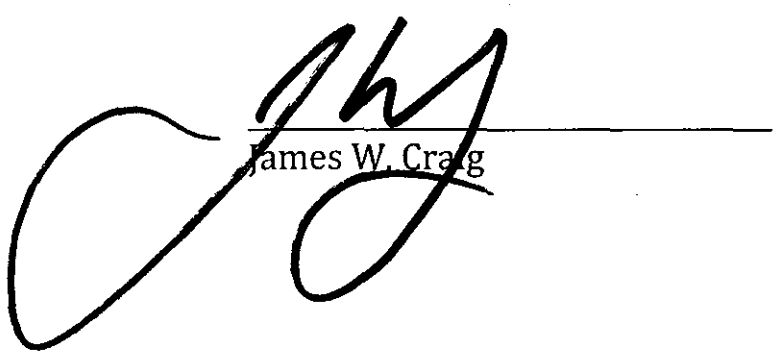
CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing Brief of Appellant on The Honorable Isodore W. Patrick, Jr. Circuit Judge, at his mailing address of P.O. Box 351, Vicksburg, MS 39181, and to Hon. Marvin L. White, Jr., Assistant Attorney General, at his mailing address of P.O. Box 220, Jackson MS 39205, and to his electronic mail address of swhit@ago.st.ms.us.

This the 31th day of January, 2011.



James W. Craig